

United States Senate

WASHINGTON, DC 20510-0609

May 26, 2022

The Honorable Janet Yellen
Secretary
Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

The Honorable Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue NW
Washington, DC 20224

Dear Secretary Yellen and Commissioner Rettig:

We write regarding the average income minimum set-aside test under the Low-Income Housing Tax Credit (LIHTC) program. We urge you to expedite release of a final rule that ensures the average income test is workable and responsive to feedback on the Internal Revenue Service's (IRS) October 30, 2020 proposed rule.

Americans are facing a severe housing supply and affordability crisis. The United States had a shortage of nearly 4 million homes at the end of 2020,¹ and in recent years there were fewer than 60 affordable and available units for every 100 renter households with very low income nationwide.² Lack of supply is pushing prices to record levels for renters and prospective homeowners alike, with home prices rising 20 percent from 2021 to 2022 alone.³ Even before the pandemic and mounting inflation began affecting families' budgets, nearly 11 million households were spending more than half of their income on housing costs.⁴

The LIHTC program is the most important federal tool for creating affordable housing, accounting for more than 90% of new affordable rental units built today.⁵ Since its inception in 1986, the LIHTC program has financed more than 3.6 million affordable rental homes.⁶ In 2018, Congress broadened the program, enabling LIHTC properties to serve households with incomes up to 80% of area median income (AMI)—the long-standing definition of “low income” in federal housing programs⁷—as long as the average income for the property does not exceed 60% of AMI.⁸ This new average income test, which owners can choose instead of the two previously existing minimum set-aside elections,⁹ requires that at least 40% of housing units be rent-restricted and occupied by households whose incomes do not exceed the imputed income limitation designated by the owner.

While the average income test is intended to expand affordable housing to more families, stakeholders from across the affordable housing community have raised concerns that implementing IRS's proposed regulations¹⁰ will be highly complex and risky compared to the LIHTC program's existing set-aside tests. In fact, since the publication of the proposed rule, few investors have been willing to invest in average income test properties due to the risk associated with that structure, contradicting congressional intent to broaden the program in this manner.

Moreover, the proposed rule also prohibits the owner from changing the designated imputed income limitation of an individual housing unit once made. Stakeholders have raised concerns

that this prohibition not only stymies the practical implementation of the average income test, but also sets up the potential for conflict with federal fair housing and other anti-discrimination laws. It may also create problems for leveraging other federal subsidies alongside the LIHTC program, since these subsidies depend on the ability to redesignate units as needed based on the circumstances of the residents in the property.

During the comment period, stakeholders—including the state Housing Finance Agencies that administer the program, housing advocates, developers, and investors—overwhelmingly urged IRS to make its final rule more workable and consistent with the existing LIHTC program and with other resources used in affordable housing finance.¹¹ More recently, more than 30 of the most active LIHTC stakeholder groups sent IRS a joint letter offering their consensus position on how IRS could modify the proposed rule to address their concerns.¹²

We are pleased by President Biden’s May 16, 2022 announcement that IRS will finalize the income averaging rule no later than September 30, 2022.¹³ Given the urgency and severity of our nation’s affordable housing crisis, we respectfully ask you to meet or exceed this deadline while ensuring the final rule provides a workable solution that incents affordable housing production.

Thank you for your consideration of this request. We look forward to working with you to address the housing challenges facing American households.

Sincerely,



Michael F. Bennet
United States Senator



Todd Young
United States Senator



Rob Portman
United States Senator



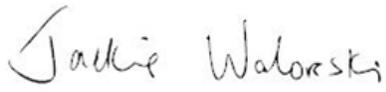
Ron Wyden
United States Senator



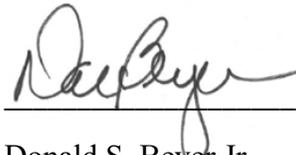
Mike Crapo
United States Senator



Suzan DelBene
Member of Congress



Jackie Walorski
Member of Congress



Donald S. Beyer Jr.
Member of Congress



Richard E. Neal
Member of Congress

¹ Sam Khater, Len Kiefer, and Venkataramana Yanamandra, “Housing Supply: A Growing Deficit” (May 7, 2021), <https://www.freddiemac.com/research/insight/20210507-housing-supply>.

² National Low Income Housing Coalition, “The Gap: A Shortage of Affordable Homes” (April 2022), https://nlihc.org/sites/default/files/gap/Gap-Report_2022.pdf.

³ CoreLogic, “U.S. Home Price Insights” (May 3, 2022), <https://www.corelogic.com/intelligence/u-s-home-price-insights/>.

⁴ Joint Center for Housing Studies of Harvard University, “America’s Rental Housing 2020” (2020), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_Americas_Rental_Housing_2020.pdf.

⁵ Nixon Peabody, “Low Income Housing Tax Credit: Financing Solutions for Developers and Investors” (2014), https://www.nixonpeabody.com/-/media/Files/Alerts/172619_Low_Income_Tax_Credit_23APR14.ashx (last accessed April 2022).

⁶ The National Council of State Housing Agencies, State HFA Factbook: 2020 NCSHA Annual Survey Results.

⁷ The National Council of State Housing Agencies, “Housing Credit Income Averaging Frequently Asked Questions” (updated April 6, 2018), <https://www.ncsha.org/wp-content/uploads/2018/04/Housing-Credit-Income-Averaging-NCSHA-04-09-2018.pdf>.

⁸ P-L 115-141, Consolidated Appropriations Act of 2018 (March 23, 2018).

⁹ Under the 20-50 test, a minimum of 20% of units must be set aside for households whose incomes do not exceed 50% of area median income (AMI). Under the 40-60 test, a minimum of 40% of units must be set aside for households whose incomes do not exceed 60% of AMI.

¹⁰ Reg-104591-18, Section 42, Low-Income Housing Credit Average Income Test Regulations Proposed Treasury Regulation Section 1.42-19 (Guidance).

¹¹ See, for example, comments from: LIHTC Working Group (December 29, 2020), <https://www.novoco.com/sites/default/files/atoms/files/lihtc-wg-avg-income-comment-letter-12292020.pdf>; The National Council of State Housing Agencies (December 17, 2020), <https://www.ncsha.org/wp-content/uploads/NCSHA-Comment-on-IRS-Average-Income-Test-Proposed-Rule-12.17.20.pdf>; The Affordable Housing Tax Credit Coalition (December 29, 2020), <https://files.constantcontact.com/d84d25d0101/256a04ca-2a76-418d-821a-2db1d521a7e3.pdf>.

¹² Housing Credit Stakeholder Sign-On Letter to IRS, Treasury on Average Income Test (December 2, 2021), <https://www.ncsha.org/resource/housing-credit-stakeholder-sign-on-letter-to-irs-treasury-on-average-income-test/>.

¹³ The White House, “President Biden Announces New Actions to Ease the Burden of Housing Costs” (May 16, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/16/president-biden-announces-new-actions-to-ease-the-burden-of-housing-costs/>.